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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

LONNETTE BUTLER,

Plaintiff and Respondent,

v.

BEALE STREET BLUES COMPANY,
INC.,

Defendant and Appellant.

B205641

(Los Angeles County
Super. Ct. No. EC041062)

APPEAL from an order of the Superior Court of Los Angeles County. Michelle Rosenblatt, Judge. Affirmed.

Manning & Marder, Kass, Ellrod, Ramirez and Scott Wm. Davenport; Spile & Siegal and Floyd J. Siegal for Defendant and Appellant.

Robert A. Kahn for Plaintiff and Respondent.

* * * * *

INTRODUCTION

Defendant Beale Street Blues Company, Inc. (Beale Street), appeals from the denial of its motion to vacate default judgment, brought pursuant to Code of Civil Procedure section 473.5 on the ground that the substituted service of summons did not result in actual notice of the lawsuit in time for it to defend the action.¹ The trial court denied the motion, finding that the motion was untimely, that the lack of notice was the result of Beale Street's inexcusable neglect, and that Beale Street's delay in filing the motion was unreasonable. We conclude that Beale Street has not shown that the trial court abused its discretion.

For the first time on appeal, Beale Street contends that the judgment is void, because the statement of damages, although served with the summons and complaint, appears to be directed only to the other defendant in the action, B.B. King's Blues Club (B.B. King's). We reject this contention, as well, and affirm the order.

BACKGROUND

Respondent Lonnette Butler commenced this action in 2005 to recover damages, for an alleged workplace injury, against B.B. King's -- her uninsured employer -- and appellant Beale Street. The summons, complaint, and statement of damages were served on Beale Street July 11, 2005, and again November 16, 2005, by substituted service on its designated agent for service of process, at the address filed with the Secretary of State. When Beale Street failed to file an answer to the complaint, respondent obtained a default

¹ Code of Civil Procedure section 473.5 provides that when service of summons has not resulted in actual notice, and a default judgment has been entered as a result, the defendant may file a motion to set aside the default judgment and for leave to defend the action. The statute also sets forth the procedure that must be followed in making such a motion.

All further statutory references are to the Code of Civil Procedure.

judgment, entered February 16, 2007. Butler served a copy of the abstract of judgment on Beale Street by mail February 28, 2007.

On May 9, 2007, Beale Street brought a motion to set aside the default judgment on the grounds of excusable neglect and surprise. Support for the motion included the declaration of its president, Thomas Peters, who stated that prior to the entry of the default judgment no one informed him that appellant had been named or served in respondent's lawsuit. Peters continued: "I was never informed or advised by either of the two gentlemen who supposedly accepted service about the service or the lawsuit. Neither person ever forwarded me a copy of the lawsuit."

In opposition to the motion, Butler submitted the declaration of one of her attorneys, Jeffrey Hughes, who attached a printout of the "California Business Portal" screen of the California Secretary of State's Website, showing Beale Street as a Tennessee corporation, registered in California since 1995, with an address of 1000 Universal Center Drive, Suite 222, Universal City, California. The printout showed Reginald Qualls as the agent for service of process, with the same address. Butler also submitted the declaration of her attorney, Robert Kahn, who authenticated copies of various attached documents, including a proof of service showing that Reginald Qualls was served with the summons and complaint July 11, 2005, by substituted service. According to the proof of service, the documents were left at 1000 Universal Center Drive, Suite 222, Universal City, California, with Allan Groves, a person over the age of 18, and the general manager of the business located there, and then mailed to Qualls at that address.² Also attached to Kahn's declaration was a certified copy of the Foreign Corporation Statement of Information filed August 16, 2004, with the California Secretary of State, showing Reginald Qualls as the designated agent for service of process for Beale Street, and the address of both the agent and Beale Street as 1000 Universal Center Drive, Suite 222, Universal City, California.

² 1000 Universal Center Drive, Suite 222, Universal City, California, is the location of B.B. King's.

A second attempt to serve Qualls at the same address was made October 18, 2005. The process server executed a declaration of nonservice, stating that an unidentified man answered the door, said that B.B. King's had nothing to do with Beale Street, and then slammed the door shut.

After the October attempt, Butler served Beale Street by substituted service a second time. The proof of service shows that copies of the complaint and summons were left for Qualls with Anthony Robertson, the director of entertainment at the business located at 1000 Universal Center Drive, on November 16, 2005, and that copies were mailed to Qualls at that address November 18, 2005.

In reply, Peters submitted another declaration, stating that the company that owned and operated B.B. King's at the time of Butler's injury was Tennco-LA, LLC (Tennco-LA), and that Tennco-LA was Butler's employer. Peters stated that Beale Street was a Tennessee corporation, did not operate any businesses in the State of California, and had never employed Butler. Peters stated that neither he nor any other Beale Street employee was aware of this lawsuit until after the default judgment had been entered. Peters admitted that Qualls was Beale Street's designated agent for service of process, but stated that he had been unable to contact Qualls, who was no longer employed by Beale Street. Peters represented that the two persons who received the summons and complaint meant for Qualls -- Groves and Robertson -- were employees of Tennco-LA and had never been employed by Beale Street.³

³ Beale Street also submitted the declaration of its attorney Richard Goor, who stated that it was his "understanding" that Beale Street operated the B.B. King's until March 1997, when ownership and operations were transferred to Tennco-LA. He stated that Butler was paid by Tennco-LA, and he attached copies of several of Butler's paychecks, personalized with the name, Tennco-LA, LLC, below which appears "D/B/A BB King's Blues Club." To a supplemental declaration, Goor attached a copy of a 1998 trade dress assignment to Tennco *Holdings*, LLC (not Tennco-LA, LLC), which Goor described as evidence that Beale Street was "in no way connected to BB King's Blues Club at the time of the incident."

On August 17, 2007, the trial court denied Beale Street's motion to vacate the default judgment. The parties stipulated that the court could consider the motion as one to quash service of summons, and the court denied that motion, as well.

Ten days later, Beale Street filed a motion for reconsideration. Beale Street submitted the declarations of Groves and Robertson, who stated that they had never been employed by Beale Street, were not authorized to accept service on its behalf, and never forwarded the summons and complaint to Peters, Qualls, or any other representative of Beale Street. Beale Street also submitted a declaration signed by Peters, who stated that he had been unable to obtain declarations from Groves or Robertson prior to the August 17 hearing, and that he had been unable to locate Qualls.

Prior to the hearing on the motion for reconsideration, Beale Street retained new counsel. On October 9, 2007, new counsel filed a supplemental memorandum of points and authorities in which she stated that the motion for reconsideration was made pursuant to section 473.5. Beale Street submitted additional declarations signed by Groves, Robertson, Peters, and the attorney for B.B. King's, Douglas Davis. Groves and Robertson stated that when served with process, they gave the papers to the general manager of B.B. King's, DeMarco Chandler. Davis stated that he was retained by Chandler to defend B.B. King's only, and that Chandler told him that Beale Street was a Tennessee corporation with no ownership interest in B.B. King's. Davis stated that he never contacted Beale Street, and did not know that "there was an issue involving the representation of Beale Street until [he] was contacted by Mr. [Goor], who substituted in as attorney of record."

In his declaration, Peters stated that Beale Street was a Tennessee corporation that had not done business in the State of California since 1997, and that Qualls left the employ of Tennco-LA and B.B. Kings after Beale Street had designated him agent for service of process. Peters stated neither Groves nor Robertson was employed by Beale Street and neither had contacted him to inform him that Beale Street had been named in the lawsuit, or that substituted service had been effected. He stated that he had been

aware of the lawsuit “in a generalized manner” prior to the entry of judgment, but had not been told that Beale Street had been named, sued, or served, or that the lawsuit had anything to do with Beale Street. Peters asserted that because of such lack of notice, Beale Street did not defend the action or obtain legal representation.

In opposition to the motion, Butler submitted Kahn’s declaration, to which he attached, among other things, the Statement of Information signed by Peters, the chief executive officer, secretary, and chief financial officer, and filed with the California Secretary of State August 18, 2004, as well as a copy of a certificate of amendment filed with the Tennessee Secretary of State, showing that in 1994, B.B. King’s Blues Club, Inc., became Beale Street Blues Company, Inc., dba B.B. King’s Blues Club and Restaurant. Kahn also attached a copy of the abstract of judgment with a proof of service by mail on February 28, 2007, addressed to Beale Street at 1000 Universal Center Drive, Suite 222, Universal City.

On November 9, 2007, the trial court denied Beale Street’s motion for reconsideration. However, noting that because Beale Street had new counsel who had raised the issue of section 473.5, the court stated that it would hear a motion brought under that statute, if based upon additional evidence. Beale Street filed its section 473.5 motion January 2, 2008, with new declarations from Groves, Robertson, Peters, and Davis, repeating statements made in their previous declarations. In addition, Groves and Robertson stated that they did not have any conversation with Peters or anyone from Beale Street about the papers given to their general manager. Peters additionally stated that Tennco-LA’s insurance carriers had denied coverage. Davis gave no new information.

In opposition to the motion, Butler submitted another declaration by Kahn, who represented that a Tennessee court had stayed enforcement of the judgment pending the outcome of an appeal from the final order, without requiring a bond. Kahn also stated that copies of two Beale Street annual reports were attached to his declaration. However, the documents do not appear in the record on appeal.

The trial court denied the motion January 25, 2008. The court made findings in its tentative ruling, which it signed and entered as the order of the court. Among other things, the court found that the motion was untimely under section 473.5, and that Beale Street's delay in making the motion was unreasonable and the result of inexcusable neglect. The court further found that the failure of the substituted service to provide actual notice was due to Beale Street's Statement of Information filed with the Secretary of State. The court found that Beale Street had actual notice of the lawsuit no later than May 9, 2007, but did not file a motion based upon section 473.5 until January 2, 2008, and never explained the reason for the delay. The court also noted the contradiction in Peters's statement that Beale Street had not done business in California since 1997, with his having filed a Statement of Information naming Qualls as the agent for service as late as 2004.

On January 28, 2008, Beale Street filed a notice of appeal from the order and the default judgment. The appeal from the default judgment was dismissed by this court as untimely, and this appeal has proceeded solely as one from the order denying Beale Street's section 473.5 motion, entered January 25, 2008.

DISCUSSION

1. *Beale Street's Contentions*

Beale Street contends that the trial court erred in finding its section 473.5 motion untimely, arguing that the 180-day statute of limitations did not begin to run upon the mailing of the default judgment, because Butler mailed it to the same address that allegedly failed to result in actual notice. In the alternative, Beale Street contends that it substantially complied with the time limits by raising the issue in its motion for reconsideration, which was filed within 180 days of service of the abstract of judgment. Beale Street also contends that the court erred in finding inexcusable neglect.

2. *Section 473.5*

"When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in

the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action. The notice of motion shall be served and filed within a reasonable time, but in no event exceeding the earlier of: (i) two years after entry of a default judgment against him or her; or (ii) 180 days after service on him or her of a written notice that the default or default judgment has been entered.” (§ 473.5, subd. (a).) The motion “shall be accompanied by an affidavit showing under oath that the party’s lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect.” (*Id.*, subd. (b).)

3. Standard of Review

Beale Street contends that the facts are undisputed and that this appeal presents only questions of law that should be reviewed de novo. The denial of a section 473.5 motion is reviewed for an abuse of discretion. (See *Olvera v. Olvera* (1991) 232 Cal.App.3d 32, 40-41.) Under an abuse of discretion standard, where there are no material disputed factual issues, the appellate court independently reviews the trial court’s determination as a question of law. (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1144.) However, we do not agree that the facts presented to the trial court in this case were undisputed. In making its ruling, the court resolved factual and credibility issues.

Because the court resolved factual and credibility issues, we must accept its factual findings if supported by substantial evidence. (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.*, *supra*, 20 Cal.4th at p. 1143.) To determine whether the trial court’s factual findings are supported by substantial evidence, we review the evidence in the light most favorable to Butler, indulging all reasonable presumptions and intendments in favor of the order, and disregarding any contradictory statements in Beale Street’s declarations. (See *Garcia v. Gallo* (1959) 176 Cal.App.2d 658, 660-661.) It is Beale Street’s burden on appeal to establish an abuse of discretion. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

4. Actual Notice

Beale Street contends that it is “beyond dispute” that it lacked actual notice of the lawsuit prior to entry of judgment. However, its declarations showed only that neither Groves nor Robertson gave Peters the summons and complaint, and that no one told Peters that Beale Street had been named or served. Groves and Robertson admittedly gave the papers to Chandler, B.B. King’s general manager, not Peters. However, because Beale Street did not submit Chandler’s declaration, the question whether he gave the papers to a representative of Beale Street remains unanswered. Peters stated that he was Beale Street’s sole director, and thus would have known if Beale Street had received actual notice of the lawsuit or the judgment. However, he did not explain how or when he did obtain actual knowledge, and, as the trial court observed, he provided no facts regarding other officers or employees.

Although Peters claimed that Beale Street did not do business in California after 1997, he failed to explain adequately why he had signed a Statement of Information under penalty of perjury in 2004 stating that Beale Street was doing business at 1000 Universal Center Drive, Suite 222, Universal City. Peters suggested that his designation of Qualls as Beale Street’s agent for service of process was the result of inappropriate legal advice, but he provided no facts to explain that conclusion, did not describe the advice, and did not reveal when the inappropriate advice was given -- in 1995, when Beale Street first registered with the California Secretary of State, or in 2004, when it filed the Statement of Information.

In sum, Peters’s declarations consisted of ambiguous conclusions and few evidentiary facts, which gave rise to more questions than answers. Peters may not have *personally* received the summons and complaint, but, as the trial court found, Beale Street failed to show that no one else had received the summons and complaint on behalf of Beale Street in time to defend the action. It is apparent that the trial court found Peters’s credibility questionable, as it pointed out that his claim that Beale Street did no

business in California after 1997 conflicted with his having filed the Statement of Information in 2004.

Further, if Peters were to be believed, and the substituted service did not result in actual notice to Beale Street, it was Beale Street's own inexcusable neglect that caused the failure. Beale Street filed the Statement of Information, signed by Peters under penalty of perjury, less than one year before this action was filed. Beale Street designated Qualls -- an employee of B.B. King's -- as its agent for service, and never adequately explained why service on a different employee of B.B. King's was insufficient to provide notice. Peters's statement that he acted on inappropriate legal advice, without dates or facts, was too vague to permit a finding of excusable neglect.

Beale Street now blames B.B. King's manager DeMarco Chandler, because he instructed B.B. King's attorney Douglas Davis not to file an answer on behalf of Beale Street. However, because Chandler's declaration was not submitted, it remains unknown why he gave that instruction or whether he communicated with a representative of Beale Street. Davis merely stated that he never contacted Beale Street, was not instructed to answer on its behalf, and did not know that "there was an issue involving the representation of Beale Street until [he] was contacted by Mr. [Goor], who substituted in as attorney of record." The substitution has not been made part of the appellate record, but Davis's use of the word "substituted" suggests that Beale Street was represented by another attorney prior to May 9, 2007, when Mr. Goor filed the first motion to vacate the default judgment. Peters's statement that he had been aware of the lawsuit "in a generalized manner" prior to the entry of judgment, without dates or facts regarding his discovery, only raises more doubts about his credibility.

It was Beale Street's burden to show that its lack of actual notice in time to defend the action was not caused by its inexcusable neglect. (See § 473.5, subd. (b).) We conclude that substantial evidence supports the trial court's determination that Beale Street did not meet its burden. (See *People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.*, *supra*, 20 Cal.4th at p. 1143.) A fortiori, Beale Street has not met

its burden on appeal to establish that the trial court abused its discretion. (See *Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 566.)

5. Unreasonable Delay

Beale Street was required to serve and file its notice of motion within a reasonable time after acquiring notice of the default judgment. (§ 473.5, subd. (a).) The trial court properly exercised its discretion in finding that the delay in bring the motion was unexplained and unreasonable. (See *Olvera v. Olvera*, *supra*, 232 Cal.App.3d at pp. 40-41.) It is Beale Street's burden on appeal to establish that the trial court abused its discretion in making this finding. (See *Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 566.) However, the delay remains unexplained. Since Beale Street made no effort in any of its declarations to explain the delay, and makes no effort here to challenge the trial court's finding, it has not met its burden.

6. Statement of Damages

The record originally filed with this court did not include the full text of the plaintiff's operative complaint. We were therefore uncertain about the specific charging allegations against the appellant. In a letter of February 11, 2009, we invited both counsel to fill this gap in the record. That was done.

However, in its March 30, 2009 letter responding to the court's request, new counsel for the appellant for the first time raised the issue of whether or not a proper statement of damages was served upon Beale Street. Beale Street contends that the default judgment is void because the statement of damages did not expressly name Beale Street. Respondent quickly objected to this letter as constituting the belated inclusion of a new issue.

In personal injury actions, where the amount of damages sought is not set forth in the complaint, the plaintiff must serve a statement of damages on the defendant before a default may be taken. (§ 425.11, subd. (c).) Any default judgment entered after a failure to serve such a statement in the manner required for service of summons is void and may

be challenged at any time, even for the first time on appeal. (*Twine v. Compton Supermarket* (1986) 179 Cal.App.3d 514, 517-518.)

Beale Street does not contend that Butler failed to serve a statement of damages by personal service prior to entry of default. It contends that even a properly served statement of damages is insufficient notice of potential damages as a matter of law, resulting in a void judgment, if it does not expressly name the defendant who was served. Beale Street refers to copies of the statement of damages attached to Butler's opposition to its first two motions. Typed in a box in the caption portion of the Judicial Council Form is a shortened description of the defendants, i.e., "B. B. King's Blues Club; et al." Typed in the space provided under the caption, after the preprinted words, "To (*name of one defendant only*)," is "B.B. King's Blues Club." "Beale Street" appears nowhere on the form.

Beale Street cites no authority holding that such a statement of damages renders the ensuing default judgment void. None of the authorities cited by Beale Street involved a properly served statement of damages that does not show the name of the defendant served. In each case, no statement of damages was served on the defaulting defendant. (See *Schwab v. Rondel Homes, Inc.* (1991) 53 Cal.3d 428, 431; *Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 830; *Pino v. Campo* (1993) 15 Cal.App.4th Supp. 1, 4-5.) Nor has our research turned up a published case regarding a properly served statement of damages that does not show the name of the defendant served. It appears that Beale Street's contention presents an issue of first impression.

However, we decline to reach the issue, because Beale Street has not provided a sufficient record for review. We cannot tell from this record what proofs of service and other papers were before the trial court when default was entered, and the application for default judgment and supporting papers are not reproduced as such in the record on appeal. Beale Street merely states, in a recently filed letter brief that to the best of its knowledge, the statement of damages in the appellate record was the one served on it by Butler. As the party challenging the judgment, it was Beale Street's burden to provide a

record that adequate for review. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575.) Since it has failed to do so, we must presume that the judgment is correct, and that all matters missing from the appellate record would support the validity of the judgment. (See *Denham v. Superior Court, supra*, 2 Cal.3d at p. 564.)

In sum, because the judgment is not void on the face of this record, the issue is not properly before us. Thus, we must affirm the order.

DISPOSITION

The order denying the section 473.5 motion is affirmed. Respondent Butler shall have her costs on appeal.

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BAUER, J.*

WE CONCUR:

RUBIN, ACTING P. J.

FLIER, J.

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.